UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JOHN JACOBS,	§	**Case No. 02-37402-BJH-7**
	§	
Debtor.	§	
	§	
USA SCREEN PRINTING & EMBROIDERY, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Adversary Pro. No. 02-3574**
	§	
JOHN JACOBS,	§	
	§	
Defendant.	§	
	§	

MEMORANDUM OPINION

Before the Court is a complaint to determine dischargeability of debt and, in the alternative, to object to discharge (the "Complaint") filed by USA Screen Printing & Embroidery, Inc. ("USA"). The Court has core jurisdiction over the Complaint pursuant to 28 U.S.C. §§ 1334 and 157. The Complaint was tried on April 8, 2003. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

For the reasons explained more fully below, and after reviewing the pleadings, the evidence admitted at trial, and the arguments of counsel, the Court concludes that the Debtor, John Jacobs ("Jacobs"), is not entitled to receive a discharge in his Chapter 7 bankruptcy case (the "Case"). As

a result, the Court need not address USA's request that the Court declare its debt nondischargeable in the Case.

FACTUAL AND PROCEDURAL BACKGROUND

Jacobs filed the Case on August 29, 2002, nine (9) days after Jacobs' corporation, John Jacobs and the Power Team, Inc. (the "Power Team"), filed a voluntary Chapter 11 petition in this district. According to Jacobs' Schedule I, he is a "self-employed" "motivational speaker/minister."[1] Plaintiff's Exhibit 21. On November 21, 2002, USA, who holds an unsatisfied consent judgment against Jacobs and the Power Team, filed the Complaint in which it alleges that its debt should be declared nondischargeable under §523(a)(2) and/or (a)(6) of the Bankruptcy Code or, in the alternative, that Jacobs should be denied a discharge under § 727(a)(2), (a)(3), (a)(4), (a)(5), and/or (a)(7) of the Bankruptcy Code.

Beginning in 1996, USA supplied certain merchandise (*i.e.*, printed t-shirts, caps, and bandanas) to the Power Team. In turn, the Power Team sold these goods in its evangelistic crusades. *See* Joint Pre-Trial Order, p. 3, ¶¶ 2-4. Jacobs testified that he and other "world class athletes" associated with the Power Team gave programs at churches, rallies, and schools, displaying feats of strength to spread a "message of encouragement and inspiration against drugs and alcohol, and a Christian message." According to Jacobs, the Power Team performed at 5 big events per week across the country and, to date, at over 15,000 public schools.

On or about July 11, 2000, USA and the Power Team entered into an agreement (the "Credit Agreement") pursuant to which USA extended credit to the Power Team for its purchases. *See* Plaintiff's Exhibit 3. As part of the Credit Agreement, Jacobs agreed to guarantee the Power Team's

[1] Jacobs testified at trial that his Schedule I was incorrect. Rather, he testified that he was an employee of the Power Team.

obligations to USA. *See id.* The guaranty clause contained in the Credit Agreement provides that Jacobs "do[es] hereby guarantee payment . . . of any indebtedness by virtue of any and all credit extended in accordance with the [Credit Agreement] . . . ." *Id.* However, according to the testimony of Candance L. Soukup ("Soukup"), USA's controller, when USA asked Jacobs to guarantee the Power Team debt, USA did not inquire about Jacobs' personal financial condition and did not ask for, or receive, a personal financial statement. Between April 2000 and August 2001, USA sold $82,979.50 of goods to the Power Team. *See* Joint Pre-Trial Order, p. 3, ¶¶ 4-6.

On December 15, 2000, Jacobs sent a letter to the Power Team's creditors, including USA, advising of certain financial difficulties that the Power Team was experiencing. However, Jacobs' letter assured such creditors that the Power Team wanted "to personally work with each creditor, to establish a payment plan." Plaintiff's Exhibit 4.

Apparently, by late 2001, USA was unwilling to work with Jacobs and the Power Team because it filed suit against Jacobs, the Power Team, and John Jacobs Evangelistic Association (collectively, the "Defendants") on September 11, 2001 in the United States District Court for the Western District of Oklahoma. *See* Joint Pre-Trial Order, p. 4, ¶ 12. Subsequently, the parties entered into a Standstill and Settlement Agreement (the "Settlement Agreement"), *see* Plaintiff's Exhibit 18, that obligated the Defendants to pay the $82,979.50 owed to USA in installments. *See* Plaintiff's Exhibit 18. As part of the Settlement Agreement, the parties entered into an agreed Consent Journal Entry of Judgment (the "Consent Judgment"), *see* Plaintiff's Exhibit 19, that was not to be filed unless the Defendants failed to pay in accordance with the Settlement Agreement. The Defendants failed to make the required settlement payments and USA caused the Consent Judgment to be entered on August 27, 2002. *See* Plaintiff's Exhibit 18, 19. As relevant here, the

Consent Judgment contained the following recitation:

> [S]olely for the purposes of any bankruptcy related proceeding of the Defendants, John Jacobs and the Power Team, Inc., John Jacobs Evangelistic Association, and John Jacobs, this Judgment is not dischargeable through bankruptcy, or any similar proceeding, pursuant to 11 U.S.C. § 523(a)(2)(A) or (B), or otherwise, for the reason that the Judgment is premised on actions of Defendants which would render them not subject to discharge.

Plaintiff's Exhibit 19, p.2, ¶ 5. No factual findings or stipulations supported this recitation.

As previously stated, the Power Team filed its Chapter 11 case on August 20, 2002 and Jacobs filed the Case on August 29, 2002. As President of the Power Team, Jacobs signed the Power Team's schedules and statement of financial affairs, which were filed on September 6, 2002. On October 1, 2002, Jacobs signed and filed his schedules and statement of financial affairs in the Case. Jacobs signed both sets of schedules and statements under penalty of perjury. *See* Joint Pre-Trial Order, p. 5-6, ¶¶ 19-23. Jacobs filed Amended Schedules B and C in the Case on December 6, 2002. *See* Defendant's Exhibit 16.

The Power Team's first meeting of creditors was held on September 26, 2002. Jacobs testified at this meeting as the corporate representative of the Power Team. Specifically, Jacobs testified that the Power Team's financial difficulties arose from primarily three events: (i) a failed mission campaign to South Africa, (ii) Jacobs' divorce, which caused a public scandal in the evangelical community and caused some former members of the Power Team to leave and begin to compete with the Power Team for charitable contributions, and (iii) the terrorist attacks of September 11, 2001, which led to a decrease in charitable contributions generally. *See* Pre-Trial Order, p.6, ¶¶ 24-25. At trial, Jacobs testified that the Power Team's financial difficulties caused his personal financial difficulties because the Power Team provided his primary source of income.

Jacobs also testified that he personally guaranteed many of the Power Team's debts.

Jacobs' schedules, *see* Plaintiff's Exhibit 21, reflect secured claims totaling $594,721.00, unsecured priority claims totaling $659,727.67, and general unsecured claims totaling $1,854,250.01. The unsecured priority tax claims and many of the general unsecured claims bear the following notation: "Claim against John Jacobs and the Power Team, Inc. Disputed as to this Debtor." Plaintiff's Exhibit 21. However, Jacobs did not mark the column reflecting the existence of a co-debtor on any of his scheduled liabilities except one – *i.e.*, the Discover claim of $24,587.00. Ruthanne Jacobs (his first wife) is shown as the co-debtor on the Discover debt. *See* Plaintiff's Exhibit 21. While most of the unsecured claims contain the above notation, the Power Team's schedules and Jacobs' schedules cannot be reconciled. There are unexplained discrepancies as to account numbers and debt amounts.

Additionally, there are other unexplained discrepancies on Jacobs' personal schedules. For example, Jacobs amended his Schedule B and Schedule C on December 6, 2002 to reflect $3,500 worth of animal heads, $25 of jewelry (cufflinks), $850 worth of clothes, and a $3,050 increase in value for his widescreen tv/stereo. *See* Defendant's Exhibit 16. Jacobs' original Schedule B, however, contained no listing of clothing assets, yet his original Schedule J listed a $400 per month laundry and dry cleaning expense. *See* Plaintiff's Exhibit 21. Jacobs listed no jewelry on his original Schedule B, listed $25.00 of cufflinks on his Amended Schedule B, yet he listed The Village Jewelers as holding an $8,000 unsecured claim on Schedule F. While Jacobs testified at trial that he purchased an engagement ring for Sara Bonham (his second wife) at The Village Jewelers, he was unable to produce any documents substantiating his testimony. Jacobs did not explain why the original value attached to his widescreen tv/stereo was $3,050 less than the amended amount.

Regarding his animal heads, Jacobs explained that when he learned they might have some value, he amended his schedules to disclose them. Jacobs blamed his lawyer for the initial non-disclosure. Jacobs testified that his lawyer had advised that they did not need to be disclosed because they would have no value to anyone except him – *i.e.*, as the person who shot the animal.

Moreover, Jacobs failed to identify either of his former spouses, Sara Bonham and Ruthanne Jacobs, on his Statement of Financial Affairs (the "SOFA.").[2] However, Schedule J lists $4,666.66 in alimony and maintenance payments, and his SOFA lists payments to both former spouses within one year of filing the Case.

In addition, Jacobs marked "none" in response to SOFA question 18, which asks debtors to "list the names, addresses, [etc.] . . .of all business of which the debtor was an officer, director, partner, or managing executive of a corporation . . . ." Of course, this answer is incorrect; Jacobs was the president of the Power Team,[3] and he served as its corporate representative at its first meeting of creditors.

Next, Jacobs' SOFA states that his 2001 income was $221,571.66 and that his 2002 income was $162,776.80. However, his 2001 income tax return lists his income in a different amount – *i.e.*, $228,772.00. In attempting to explain this discrepancy at trial, Jacobs testified that after filing his tax return, "we" calculated that the reported income as shown on the tax return was too high and thus, the amount shown on his SOFA was actually the correct amount. However, Jacobs could not explain the calculation that lead to the difference and he admitted that no amended tax return had

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[2]Jacobs testified that his second marriage to Sara Bonham, which took place in South Africa, was annulled. Nevertheless, Sara Bonham is not listed as a former spouse.

[3]It is unclear on this record if Jacobs is still the President of the Power Team. A chapter 11 trustee was appointed for the Power Team on November 22, 2002.

been filed.

Next, Jacobs listed 2416 Hunters Ridge, Irving, Texas as his homestead on both his original and his amended Schedule A. However, Plaintiff's Exhibits 25 and 26 show that Jacobs sold this property for $441,242.76 on January 10, 2003. Jacobs admitted at trial that he sold this property on or about that date. However, Jacobs did not seek, or obtain, Court authority to sell this property. Moreover, a review of the docket sheet in the Case reveals that the property was sold before the time to object to Jacobs' claimed exemptions had expired. Finally, the title company closing the sale asked Jacobs to sign an "Indemnity and Affidavit as to Debts, Liens, and Possession," in which he swore that "no proceedings in bankruptcy or receivership have been instituted by or against affiant . . . ." Of course, this affidavit was false because Jacobs was a Chapter 7 debtor when he signed and swore to the contrary at the closing. *See* Plaintiff's Exhibit 27. When asked what happened to the net proceeds from the sale of this property, Jacobs was unsure how he spent the money.[4]

Finally, Jacobs failed to produce any documentation regarding his substantial pre-petition credit card transactions totaling in excess of $600,000.00. He was unable to explain in any detail the basis of this debt or what was purchased with this credit.[5] Of course, Jacobs' credit card statements, if produced, would have explained the basis of this substantial debt and would have revealed whether any assets were purchased with this credit that should have been disclosed and

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[4]While the Court might have authorized the sale of this property provided the net proceeds were escrowed pending the expiration of the time for creditors to object to Jacobs' claimed exemptions, no notice was given to any creditor of the proposed sale and the net proceeds were disbursed to Jacobs by the title company who was unaware of the Case due to Jacobs' false statement.

[5]Some of the American Express credit card account numbers listed on Jacobs' schedules match credit card account numbers listed on the Power Team's schedules. However, the amount of debt shown is different, so the Court cannot determine what American Express credit card debt is personal instead of corporate. Without regard to the American Express credit card debt, Jacobs scheduled individual credit card debt of $8,167 to Bank One Visa, $17,293 to Citibank, $24,587 to Discover, $11,645 to First USA Bank, $91,295 to MBNA America, and $5,662 to Sun Trust.

made available to the trustee to liquidate for the benefit of Jacobs' creditors.[6] Jacobs failed to produce other financial records requested by USA prior to trial. *See* Plaintiff's Exhibit 32. In response to USA's document requests, Jacobs did produce his tax returns for 1999, 2000, and 2001, as well as the Agreed Final Decree of Divorce and Agreement Incident to Divorce (the "Divorce Agreement") between Jacobs and his first wife, Ruthanne Jacobs. *See* Plaintiff's Exhibits 1, 2, 23, 29, 30 & 31.

While Jacobs' counsel responded to USA's other discovery requests by objecting, the objections were not made timely. In short, Jacobs objected "because [these Requests] [are] overly broad in terms of time and scope, or seek[] information not relevant to the lawsuit, or reasonably calculated to lead to the discovery of admissible evidence." Defendant's Exhibit 15. In some of his responses, Jacobs noted that he "is attempting to locate documents which may be responsive to this Request and will forward any documents to Plaintiff's Counsel as soon as they become available . . . ." Defendant's Exhibit 15.

Jacobs' response and objection was served on March 28, 2003, 4 days after the 30-day deadline set by Federal Rule of Civil Procedure 34.[7] Jacobs did not seek a protective order, and USA did not make a motion to compel. Therefore, none of these requested, but objected-to, documents was produced.[8]

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[6]The Case is a no-asset case. The Trustee filed his first "no-asset" report on October 8, 2002 and a second "no-asset" report on January 13, 2003.

[7]Federal Rule of Civil Procedure 34(b) provides that "[t]he party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29." FED. R. CIV. P. 34(b). Here, neither party requested a shorter or longer time, and no Rule 29 agreement was made.

[8]Counsel for Jacobs told the Court at trial that she had offered to continue the trial in order to "sort out" USA's discovery requests – *i.e.,* discern what documents USA really wanted and produce them, but that USA wanted to proceed to trial.

LEGAL ANALYSIS

Denial of Discharge

As noted previously, USA contends that Jacobs should be denied a discharge in accordance with § 727(a)(2), (a)(3), (a)(4), (a)(5), and/or (a)(7) of the Bankruptcy Code. At trial, USA presented evidence primarily focused on supporting claims asserted under § 727(a)(3) and (a)(4).

Standard under Section 727

A bankruptcy discharge is not a matter of right, but rather a statutory privilege afforded a debtor who meets certain requirements. Section 727(a) provides that the court shall grant a debtor a discharge, unless:

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> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed – (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition;
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> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case;
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> (4) the debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account; . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities; . . .
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> * * *
>
> (7) the debtor has committed any act specified in paragraph (2), (3),

> (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider; . . . .

11 U.S.C. § 727(a)(2), (3), (4), (5), and (7).

Bankruptcy Rule 4005 places the burden of proof on the party objecting to discharge. *See* FED. R. BANKR. P. 4005. Moreover, exceptions to discharge are to be construed liberally in favor of the debtor and strictly against the creditor in furtherance of the Bankruptcy Code's "fresh start" policy. *See Texas Lottery Comm'n v. Tran (In re Tran)*, 151 F.3d 339, 342 (5th Cir. 1998); *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 602 (5th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999); *In re DeVoll,* 266 B.R. 81, 97 (Bankr. N.D. Tex. 2001). The creditor bears the burden of proof and must establish each of the required elements by a preponderance of the evidence. *See Cullen Ctr. Bank & Trust v. Lightfoot (In re Lightfoot)*, 152 B.R. 141, 146 (Bankr. S.D. Tex. 1993) (citing *Grogan v. Garner*, 498 U.S. 279 (1991)) ("the United States Supreme Court held that the appropriate standard of proof in 11 U.S.C. § 523 matters is the preponderance of the evidence standard. . . .The rationale employed by the Supreme Court in *Grogan* applies as well in 11 U.S.C. § 727 proceedings."); *First Nat'l Bank v. Serafini,* 938 F.2d 1156, 1157 (10th Cir. 1991). If the creditor establishes any one of the grounds under § 727(a) for a denial of discharge, the court need not decide the propriety of any of the other grounds. *See Beauboeuf v. Beaubouef (In re Beauboeuf)*, 966 F.2d 174, 177 (5th Cir. 1992); *Hibernia Nat'l Bank v. Perez (In re Perez)*, 954 F.2d 1026, 1027 (5th Cir. 1992).

Here, for the reasons explained below, the Court finds ample support for the denial of Jacobs' discharge pursuant to § 727(a)(3) and (a)(4). Thus, the Court will not address the remaining claims asserted by USA in the Complaint because they are moot.

Section 727(a)(3)

To prevail on its contention that Jacobs' discharge must be denied under § 727(a)(3), USA must establish: (i) that Jacobs concealed, failed to keep, or failed to preserve books or records; and (ii) that such concealment or failure makes it impossible to ascertain his financial condition and material business transactions. *See Pher Partners v. Womble (In re Womble)*, 289 B.R. 836, 856 (Bankr. N.D. Tex. 2003); *Beneficial Mortg. Co. v. Craig (In re Craig)*, 140 B.R. 454, 458 (Bankr. N.D. Ohio 1992). Section 727(a)(3) is intended to allow creditors (and the trustee) written evidence of the debtor's financial condition and past transactions. The court is to determine the adequacy of the debtor's records on a case-by-case basis, taking into consideration the "debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interests of justice." *United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990); *In re Womble*, 289 B.R. at 856. More sophisticated debtors "are held to a higher level of accountability." *McDonough v. Sigust (In re Sigust)*, 255 B.R. 822, 829 (Bankr. W.D. La. 2000); *see also Meridian Bank v. Alen*, 958 F.2d 1226, 1231-32 (3d Cir. 1992); *Goff v. Russell Co. (In re Goff)*, 495 F.2d 199, 201-02 (5th Cir. 1974). The court has reasonably wide discretion in determining whether the books and records produced are sufficient to trace the debtor's financial history. *See Texas Nat'l Bank of Beaumont v. Edson*, 100 F.2d 789, 791 (5th Cir. 1939); *Compton v. Powers (In re Powers)*, 112 B.R. 184, 190 (Bankr. S.D. Tex. 1989); *WTHW Inv. Builders v. Dias (In re Dias)*, 95 B.R. 419, 422 (Bankr. N.D. Tex. 1988). Subsection (a)(3) does not contain an intent requirement, so USA need not prove that Jacobs intended to defraud his creditors. *See Union Planters Bank, N.A. v. Connors*, 283 F.3d 896, 901 (7th Cir. 2002); *In re Scott*, 172 F.3d 959, 969 (7th Cir. 1999); *In re Powers*, 112 B.R. 184, 190 (Bankr. S.D. Tex. 1989). Unless Jacobs

can justify a failure to keep or produce such records, a discharge should not be granted. *See In re Womble*, 289 B.R. at 856 (citing *WTHW Inv. Builders v. Dias (In re Dias))*, 95 B.R. 419, 422 (Bankr. N.D. Tex. 1988)).

As noted previously, Jacobs founded the Power Team and served as its President. He was well compensated for his services as an officer and he traveled extensively (throughout the United States and abroad) with the Power Team. While neither side presented evidence regarding his educational background, Jacobs is obviously an intelligent man who traveled extensively in delivering the Power Team's anti-drug message to kids. The Court finds him to be an intelligent and sophisticated businessman.

In response to what were legitimate requests for production of documents under Federal Rule of Civil Procedure 34(a), Jacobs failed to produce records of his, or the Power Team's, financial transactions.[9] While USA's request for production was broad in scope (USA requested documents back to 1997), its requests were clearly legitimate in regards to years in which both Jacobs and the Power Team began to have financial troubles and incur substantial credit card debts which were not promptly repaid.[10] In addition, while Jacobs objected to USA's requests, the objection was not timely. At trial, in explanation, Jacobs' counsel stated that she was "too busy" to respond timely, but that she offered to continue the trial setting in order to gather and sort through Jacobs'

[9]USA also requested the Power Team's corporate books. Jacobs objected on the basis that a Chapter 11 trustee had possession of the Power Team's books pursuant to a court order appointing the trustee. The record does not indicate whether USA attempted to procure the documents from the Chapter 11 trustee. In light of the fact that USA did not file a motion to compel, the Court expresses no opinion on Jacobs' ability to produce the Power Teams' financial records.

[10]Records of the Power Team were at least partially relevant in light of Jacobs' admission that he had guaranteed many of the Power Teams' debts and in light of the admitted overlap in corporate and personal credit card debt. Again, the Court expresses no view as to whether these documents were properly sought from Jacobs instead of the Chapter 11 trustee.

documents (and then produce those documents which were relevant for trial), but that USA declined her offer and wanted to proceed to trial. However, Jacobs' counsel did not seek, or obtain, a protective order in connection with USA's document requests. Thus, the Court is presented with at least partially legitimate requests for production, that while objected to, were objected to late without a companion request for a protective order.

In general, in the absence of an extension of time, the failure to object to discovery requests within the time fixed constitutes a waiver of any objection. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection."); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) ("failure to object to interrogatories within time fixed by Rule 33, F. R. Civ. P. constitutes a waiver of any objection."); *Safeco Ins. Co. of Am. v. Rawstrom*, 183 F.R.D. 668, 670 (C.D. Cal. 1998) (defendant's supplemental response untimely because it was not served within 30 days after the service of interrogatories); *Deal v. Lutheran Hosp. & Homes*, 127 F.R.D. 166, 167-69 (D. Alaska 1989) (procedures under Rule 45(d)(1), as well as 33, 34, and 36 [requests for production] should be "similar if not identical. . . . and the law is well settled that the failure to timely file objections to interrogatories . . . results in a waiver of objections. . . ."); *Krewson v. City of Quicy*, 120 F.R.D. 6, 7 (D. Mass. 1988) ("I rule that all of the objections have been waived. If a party fails to file *timely* objections to document requests, such a failure constitutes a waiver of any objections which a party might have to the requests."); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D. Ala. 1976) ("It is clear that the defendants' failure to file timely objections to the Request for Production constituted a waiver of the objections."); *Cf. Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 51-52 (S.D.N.Y. 1996) (failure to serve written objections to a

subpoena within the time specified constitutes a waiver of such objections; a non-party, overbroad request modified as appropriate relief); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996) (generally, a party's failure to serve timely objections to document production waives any objections to those requests, but response served 6 days late did not operate as waiver of work product privilege or joint prosecution privilege).

"[A] party or person must seek a protective order under Rule 26(c) if he desires not to appear or respond to a discovery request." *In re Air Crash Disaster At Detroit Metropolitan Airport*, 130 F.R.D. 627, 630 (E.D. Mich. 1989). "The obligation to timely move for a protective order applies equally to written discovery as to protective orders for oral depositions." *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D.N.C. 1991) (citing *United States v. Int'l Bus. Machines*, 70 F.R.D. 700 (S.D.N.Y. 1976) and *U.S. v. Int'l Bus. Machines Corp.*, 79 F.R.D. 412 (S.D.N.Y. 1978)). As noted by the *Brittain* court, "[p]ermitting [a] party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes." *Brittain*, 136 F.R.D. at 413.

Here, many of the documents requested by USA were discoverable – *i.e.*, they were not subject to proper claims of privilege. While his trial testimony was often imprecise, Jacobs testified that he thought his secretary had many of the records and documents that USA sought. However, according to Jacobs, they were not produced because his lawyer told him the discovery request was too broad.

This testimony raises a question as to whether Jacobs "failed to keep and preserve . . . recorded information . . . from which his financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3). While the requested documents were never produced, Jacobs

testified that his secretary did keep and maintain them.

Nevertheless, section 727(a)(3) also provides that a discharge is not merited if a debtor has "concealed" such recorded information. 11 U.S.C. § 727(a)(3). Thus, as relevant here, does Jacobs' failure to produce amount to a concealment prohibited by section 727(a)(3)?

Courts are to give the words of a statute their "'ordinary, contemporary, common meaning' absent some indication that Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citing and quoting *Walters v. Metro. Ed. Enters., Inc.* 519 U.S. 202, 207 (1997) and *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380. 380)); *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 435 (5th Cir. 200). According to Black's Law Dictionary, to conceal means to "hide, secrete, or withhold from the knowledge of others," or to "hide or withdraw from observation, or prevent discovery of." Black's Law Dictionary 288 (6th ed. 1990).

Here, USA properly requested at least some documents and Jacobs never produced them. While Jacobs objected, he objected late, thus waiving his objections. No meaningful documents were ever produced to USA. In fact, it appears that Jacobs never produced the documents to his own attorney.

Relying on its plain meaning, the Court concludes that Jacobs' failure to produce documents in response to USA's request constitutes a concealment of those documents. This concealment made it impossible for USA, and the Court, to verify the accuracy of the financial information contained in Jacobs' schedules and SOFA[11] and/or independently ascertain Jacobs' financial condition and material business transactions. Thus, unless Jacobs can demonstrate that "such act or failure to act

[11]Jacobs' schedules and SOFA are full of "mistakes," as Jacobs admitted at trial. These admitted mistakes cause concern over what other "mistakes" might be found if the underlying documents were ever examined.

was justified under all of the circumstances of the case," Jacobs' discharge must be denied. 11 U.S.C. § 727(a)(3).

Jacobs' explanation for failing to produce the documents USA requested was two-fold: (i) his lawyer told him he did not need to produce the documents because the request was overly broad and (ii) he was constantly traveling and his office staff was in charge of the documents. Neither explanation is legally sufficient. At a minimum, Jacobs' objections to the document requests should have been timely filed and accompanied by a motion for protective order. As noted previously, the objections were filed late and without a companion request for a protective order excusing production from the Court. Moreover, if Jacobs was "too busy" to produce the documents on a timely basis, he could have sought a continuance of the trial so that the documents could be produced and his financial condition and/or material business transactions could be evaluated by USA and/or the Court.

On this record, the Court concludes that Jacobs' failure to produce documents constitutes an unjustified concealment within the meaning of § 727(a)(3) of the Bankruptcy Code. As a result, Jacobs is not entitled to a discharge.

Section 727(a)(4)

To deny Jacobs' discharge under § 727(a)(4), USA must prove that: (i) Jacobs made a statement under oath; (ii) the statement was false; (iii) Jacobs knew the statement was false; (iv) Jacobs made the statement with fraudulent intent; and (v) the statement related materially to the bankruptcy case. *See In re Sholdra*, 249 F.3d 380, 382 (5th Cir.) *cert. denied,* 534 U.S. 1042 (2001); *In re Beaubouef*, 966 F.2d 174, 177-78 (5th Cir. 1992). It is essential to the administration of a bankruptcy case that a debtor's schedules and statement of financial affairs be accurate and

complete, *see In re Lightfoot*, 152 B.R. 141, 149 (Bankr. S.D. Tex. 1993), because "[t]he bankruptcy system relies on a debtor to deal honestly with his creditors by making full, complete and honest disclosure in his statements and schedules." *Morton v. Dreyer (In re Dreyer)*, 127 B.R. 587, 593 (Bankr. N.D. Tex. 1991).

False oaths sufficient to deny a debtor's discharge include false statements or omissions in the debtor's schedules,[12] and/or a false statement by the debtor at an examination during the case. *See In re Beaubouef*, 966 F.2d 174, 177-78 (5th Cir. 1992). "A debtor has a paramount duty to carefully consider all questions posed on his schedules and statement of affairs and see that each question is answered completely in all respects." *In re Dreyer*, 127 B.R. at 593-94. If a debtor is uncertain as to whether certain assets or information are legally required to be included in his petition, schedules or statements, it is his duty to disclose the assets or information so that any questions may be resolved. *See FDIC v. Sullivan (In re Sullivan)*, 204 B.R. 919, 942 (Bankr. N.D. Tex. 1997); *In re Dreyer*, 127 B.R. 587, 597. Section 727(a)(4) requires that the false statement be made "in . . . the case," or "in connection with the case." 11 U.S.C. § 727(a)(4). False statements in schedules are "in the case," and false statements made in affidavits or pleadings are made "in connection with the case." *See, e.g., Grant v. Simmons (In re Simmons)*, 113 B.R. 741, 745 (Bankr. M.D. Fla. 1990) (false statements in both schedules and affidavits); *Day v. Ailetcher (In re Ailetcher)*, 49 B.R. 681, 687 (Bankr. D. Hawaii 1985) (false statements in pleadings). *Cf. Savannah Valley Carpets v. Ellison (In re Ellison)*, 34 B.R. 120, 126 (false statements in affidavits made *prior to the commencement of the case*, not "in connection with the case.") (emphasis added).

As to the materiality element, the Fifth Circuit notes:

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[12]Bankruptcy Rule 1008 provides that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." FED. R. BANKR. P. 1008.

> "In determining whether an omission is material, the issue is not merely the value of the omitted assets or whether the omission was detrimental to creditors." Collier on Bankruptcy ¶ 727.04[1], at 727-59. "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *In re Chalik*, 748 F.2d 616, 617 (11th Cir. 1984).

In re Beaubouef, 966 F.2d at 177 (citations in original). The requisite intent to deceive can be found when the debtor exhibits a "reckless indifference to the truth." *In re Beauboeuf*, 966 F.2d at 178. Even a series of "innocent mistakes or omissions can constitute evidence of a pattern of reckless disregard for the truth." *In re Sullivan*, 204 B.R. 919, 942-43 (Bankr. W.D. La. 2000); *see also InterFirst Bank Greenville, N.A. v. Morris (In re Morris)*, 58 B.R. 422, 428 (Bankr. N.D. Tex. 1986); *Economy Brick Sales, Inc. v. Gonday (In re Gonday)*, 27 B.R. 428, 433 (Bankr. M.D. La. 1983). The court looks at the circumstances surrounding the omissions and/or mistakes to determine if indeed they were intentional. *See In re Sullivan*, 204 B.R. at 943 (citing *Morris*, 58 B.R. at 428).

As noted previously, Jacobs omitted important information in his schedules and SOFA, including failing to list either of his former spouses and failing to disclose that he was the President of the Power Team. In addition, Jacobs' schedules and the Power Team's schedules cannot be reconciled with regard to substantial allegedly overlapping credit card and other debt. While he testified that he guaranteed many of the claims against the Power Team, he failed to identify the Power Team as a "co-debtor" on any of the claims on his schedules.

At trial, Jacobs attempted to explain these and other discrepancies as simple "mistakes" or "oversights." He initially attempted to shift the blame to people who work for him – *i.e.*, his lawyers, his accountants, and/or his office staff. When the Court expressed some skepticism and noted that it was his signature on the schedules and SOFA, Jacobs finally admitted that "in the end,

it was my fault."

Although characterized by Jacobs as "mistakes" or "oversights," they related to material information. Creditors should not be required to guess about inconsistent information within schedules and statements or make judgments as to which of inconsistent answers is correct. A debtor has an obligation to review his schedules and statement of financial affairs to insure that his answers are complete and accurate, particularly a well educated or sophisticated debtor. The information requested on the schedules and statements is significant to creditors and estate fiduciaries. For example, ex-wives may have property that is recoverable for creditors; affiliates may also be a source of assets for a debtor's creditors.

Here, in answer to straightforward questions on his SOFA, Jacobs failed to disclose either his ex-wives or his affiliation with the Power Team. How do you forget your ex-wives or your affiliation with a corporation that has provided you with hundreds of thousands of dollars in income over the years? From the Court's perspective, you don't. Only one of two explanations is possible – *i.e.*, either Jacobs intended to deceive his creditors or he was so cavalier in filling out his schedules and SOFA that he did not take the time to properly prepare or review them before attesting to their accuracy under penalty of perjury.[13] At a minimum, Jacobs exhibited a reckless disregard for the truth.

While the Court finds that Jacobs acted with reckless disregard in preparing his bankruptcy schedules and SOFA, what the Court finds most egregious is the false oath made by Jacobs in

[13]On this record, the Court does not find that Jacobs' failure to properly fill out his schedules and SOFA was done with a malicious intent to deceive his creditors. The Court's perception of Jacobs is that he is a "big picture" person. He is not detail oriented and he is used to having the Power Team's administrative staff take care of the details in his personal life. However, the Bankruptcy Code imposes certain responsibilities on Chapter 7 debtors in exchange for the benefits a bankruptcy filing can bestow – *i.e.*, a discharge of pre-filing debts. Here, Jacobs failed to uphold his end of the bargain – his conduct in the Case demonstrates a reckless disregard for the truth.

regards to the sale of his homestead. Stated most simply, Jacobs submitted a false affidavit to the title company charged with the closing of the sale. Jacobs signed an "Indemnity and Affidavit as to Debts, Liens, and Possession" in which he stated that "upon oath . . . no proceedings in bankruptcy or receivership have been instituted by or against affiant . . . ." This was patently untrue. Jacobs voluntarily filed the Case some four months earlier and he knew that the Case was still pending at the time of the sale. *See* Plaintiff's Exhibit 27.

Jacobs offered no credible explanation for his lie. Jacobs' false statement was also highly material – as a debtor, Jacobs was selling "property of the estate" without Court approval. *See* 11 U.S.C. § 541(a). If the title company had known the truth, it would not have closed the sale without authorization from the Court. While Jacobs claimed the property as his exempt homestead, the time for objections had not run.

The Court finds that Jacobs' false affidavit in connection with the sale of what he claimed as his homestead and Jacobs' obvious reckless disregard for the truth in preparing his bankruptcy schedules and SOFA evidence the necessary intent to deceive. For these reasons, Jacobs' various false oaths warrant a denial of discharge under § 727(a)(4).

CONCLUSION

Jacobs' discharge must be denied in accordance with §§ 727(a)(3) and (a)(4) of the Bankruptcy Code. A judgment denying Jacobs' discharge will be entered separately.

Signed: May 13, 2003.

Barbara J. Houser
United States Bankruptcy Judge